

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 05-0383  
Sales and Use Tax  
Tax Period 2001-2004**

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**ISSUES**

**I. Sales and Use Tax-Taxpayer One-Imposition of Sales Tax**

**Authority:** IC § 6-8.1-5-1(b); IC § 6-8.1-5-4; IC § 6-2.5-2-1; IC § 6-2.5.2-2.

Taxpayer One protested the imposition of sales tax.

**II. Sales and Use Tax-Taxpayer One- Services**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-1(b).

Taxpayer One protested the assessment of sales tax on certain services.

**III. Sales and Use Tax-Taxpayer One-Credit for Sales Tax Paid**

**Authority:** IC § 6-2.5-3-4(a).

Taxpayer One protested the assessment of use tax on items on which it claims it paid sales tax at the time of purchase.

**IV. Sales and Use Tax-Taxpayer One-Occasional Sale**

**Authority:** IC § 6-2.5-2-1(a).

Taxpayer One protested the tax assessed on a sale it considered an occasional sale.

**V. Sales and Use Tax-Taxpayer Two- Credit for Taxes Remitted by Another Taxpayer**

**Authority:** IC § 6-2.5-6-1(a).

Taxpayer Two protested the disallowance of a credit for taxes remitted by another taxpayer.

**VI. Sales and Use Tax-Taxpayer 2-Imposition of Sales Tax**

**Authority:** IC § 6-8.1-5-1(b).

Taxpayer Two protests the imposition of the sales tax.

**VII. Tax Administration- Taxpayers One and Two-Ten Percent Negligence Penalty**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b).

The taxpayers protested the imposition of the ten percent negligence penalty.

**Statement of Facts**

Taxpayer One was a corporation that operated a sit down restaurant from 2000 through January 2002. Taxpayer Two was an individual doing business as a vendor selling food at fairs and outdoor festivals. Taxpayer Two was also the majority shareholder of Taxpayer One. During the audit period, the department worked with an accountant who was representing both taxpayers. After the audit period, Taxpayers One and Two both employed a new representative. After an audit of the two taxpayers, the Indiana Department of Revenue (department) assessed additional sales and use tax, interest, and penalty on each taxpayer. The taxpayers protested the assessments and a joint hearing was held. This Letter of Findings results.

**I. Sales and Use Tax- Taxpayer One-Imposition of Sales Tax**

**Discussion**

The original accountant presented bank deposit slips, monthly cash sales receipts, credit card receipts, and other miscellaneous documents to the department. From these records, the department reconstructed Taxpayer One's gross sales subject to the imposition of the sales tax. Taxpayer One protested that the gross sales figures were too high because the bank deposit slips included cash advances from the owner's credit cards and loans from Taxpayer Two. Therefore, the bank deposits would be greater than the actual amount of receipts from sales at the restaurant. Taxpayer One argued that since the amounts of the deposits that represented cash advances and loans would not be subject to the imposition of sales tax, they should be deducted from the department's determination of Taxpayer One's gross sales subject to sales tax.

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid. IC § 6-8.1-5-1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. *Id.* Taxpayers are required to keep adequate books and records so that the department can determine the proper tax owed to the state. IC § 6-8.1-5-4.

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. IC § 6-2.5-2-1. The retail merchant is required to collect and remit the sales taxes due to the state. Id. The amount of the tax is based upon the gross retail income received by the retail merchant for the sale of the tangible personal property. IC § 6-2.5-2-2.

In support of its contention that the gross sales upon which the department assessed sales tax were inflated due to cash advances and loans from Taxpayer Two, Taxpayer One presented bank statements indicating that cash advances were made to the owner of the stock in Taxpayer One. Taxpayer One also presented copies of checks allegedly loaning the money from Taxpayer Two to Taxpayer One. These checks were signed by the principal shareholder of the stock of Taxpayer One and the person doing business as Taxpayer Two. The checks were numbered 1028, 1029, and 1030. There was no indication that the checks were cancelled by the bank. There was no way to trace the cash advances to the corporation's books and accounts. There were no promissory notes or loan documents presented that indicated loans were actually made to Taxpayer One. The submitted documentation did not meet the standard necessary to sustain the taxpayer's burden of proving that the department's assessment was incorrect.

### **Finding**

Taxpayer One's protest to the amount of the gross retail sales on which sales tax was imposed is denied.

## **II. Sales and Use Tax-Taxpayer One -Services**

### **Discussion**

Taxpayer One contended that the department incorrectly imposed sales tax on certain services. Specifically, Taxpayer One contended that the department incorrectly assessed sales tax on knife sharpening service charges and drain cleaning service charges.

Indiana imposes a gross retail or sales tax on retail sales in Indiana. IC § 6-2.5-2-1. A retail sale is a transfer of tangible personal property for consideration. IC § 6-2.5-4-1(b). Except for certain enumerated services, the provision of services is not subject to the Indiana sales/use tax.

The department assessed use tax on payments to a Knife Company where the invoice said that the payments were for "knives." Taxpayer One contended that invoices actually represented payments for the non taxable service of sharpening Taxpayer One's knives. The taxpayer was unable to substantiate that the payments were for the non-taxable service of knife sharpening rather than the taxable purchase or rental of knives. The taxpayer failed to sustain its burden of substantiating that the audit assessment was incorrect.

The department also assessed use tax on payments made to a drain cleaning company. The taxpayer was unable to substantiate that the company merely provided the service of cleaning the drain and did not install taxable equipment. Therefore, the taxpayer's protest is denied.

### **Finding**

The taxpayer's protest to the assessment of use tax on payments to the knife company and drain cleaning company is denied.

### **III. Sales and Use Tax- Taxpayer One-Credit for Sales Tax Paid**

#### **Discussion**

The taxpayer protested the assessment of use tax on three items. The taxpayer contended that the use of these items was exempt from the use tax pursuant to IC § 6-2.5-3-4(a) because the taxpayer had paid the sales tax at the time of purchase.

The taxpayer presented invoices indicating that sales tax was paid on each of the items. The sales taxes were, however, paid to either Kentucky or Illinois. In each case, the transaction took place in Indiana. Therefore, Indiana sales/use tax was due. Incorrectly paying the sales tax of another state does not absolve the taxpayer from the duty of paying Indiana use tax.

The department assessed sales tax on the purchase of miscellaneous items from a vendor on October 20, 2001. Taxpayer One contended that the sales tax was already paid on this purchase. Taxpayer One offered several other checks made out to the same vendor as evidence that the sales tax was paid on the October 20, 2001 transaction. If the taxpayer inadvertently paid Kentucky or Illinois sales tax on a transaction subject to Indiana sales tax, that is a matter best resolved between the taxpayer and Illinois and Kentucky. Those checks are, however, irrelevant to the protested tax liability. Taxpayer One did not sustain its burden of proving that sales tax was improperly imposed on this purchase of miscellaneous items.

### **Finding**

The taxpayer's protest is denied.

### **IV. Sales and Use Tax-Taxpayer One-Occasional Sale**

#### **Discussion**

Taxpayer One bought miscellaneous items from a vendor June 4, 2001 without paying sales tax on the transaction. Taxpayer One contended that the transaction did not qualify as a retail sale subject to the sales tax because the vendor was not a retail merchant.

The sales tax is imposed on the purchase of tangible personal property in a retail transaction. IC § 6-2.5-2-1. Taxpayer 1 did not provide any documentation to substantiate its contention that the miscellaneous items were actually purchased in an occasional sale rather than a retail transaction.

### **Finding**

Taxpayer One's protest to the tax assessed on this purchase is denied.

**V.     Sales and Use Tax-Taxpayer Two- Credit for Taxes Remitted**

**Discussion**

Taxpayer Two argued that it should have received more credit for sales taxes remitted to the state by another related taxpayer.

The responsibilities taxpayers have concerning filing and remitting sales taxes are enumerated at IC § 6-2.5-6-1(a) as follows:

Each person liable for collecting the state gross retail or use tax shall file a return for each calendar month and pay the state gross retail and use taxes that the person collects during that month.

This statute makes it clear that each concern collects sales taxes for its sales and remits those taxes to the state. Taxpayer Two did not cite any statutory authority allowing the department to credit one taxpayer's account with taxes paid by another taxpayer to the other taxpayer's account. The department has no such authority.

**Finding**

Taxpayer Two's protest is denied.

**VI.     Sales and Use Tax-Taxpayer Two- Imposition of Sales Tax**

**Discussion**

Through its representative, Taxpayer Two provided the department with original records for the year 2001. These records were used to determine Taxpayer Two's sales tax liability for the year 2001. The department used projections to determine Taxpayer 2's sales tax liabilities for the years 2002-2004. Taxpayer Two protested the amounts of the liabilities. To support its contention that the liabilities for sales taxes were overstated, Taxpayer Two submitted several computer runs of transaction detail. The first summary was of Taxpayer Two's transactions in the year 2000. Taxpayer Two also submitted a computer run of income by transaction detail for a third taxpayer for the year 2002 and a fourth taxpayer for the year 2004.

The submitted documentation is inadequate. There was no backup documentation for the computer runs. The only computer statement of income for Taxpayer Two was for a year not included in the audit. The computer runs for the other two taxpayers cannot be used to substantiate Taxpayer Two's income.

The taxpayer also submitted documentation to show that it operated less than four months in Indiana. Once again, however, that documentation was not always in the name of Taxpayer Two. Even if all the documentation of operations outside Indiana were

acceptable, it would not necessarily establish that Taxpayer Two did not have operations in Indiana each year of the audit for the periods assessed in the audit.

Taxpayer Two failed to maintain documentation adequate to sustain its burden of proving that the assessment was incorrect as required by IC § 6-8.1-5-1(b).

### **Finding**

Taxpayer Two's protest to the imposition of sales tax is denied.

## **VII. Tax Administration- Ten Percent Negligence Penalty**

### **Discussion**

The taxpayers protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayers did not keep adequate records to substantiate their payments of sales and use taxes. They did not follow the law and the department's directions on the collection and payment of sales and use taxes. These breaches of the taxpayer's duty to properly report and remit sales and use taxes constituted negligence.

### **Finding**

The taxpayer's protest is denied.